(1)

CASE NO: _____

THE SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1993

CITY OF EDMONDS

Petitioner

v.

Washington State Building Code Council, et al.,

Respondents

and

United States of America

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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18 pp

I. QUESTION PRESENTED FOR REVIEW

Does the traditional zoning definition of a "single family", established to limit the use and occupancy of residences in single family residential zones, constitute a "reasonable occupancy limitation" pursuant to the exemption created by the Fair Housing Act Amendments, 42 U.S.C. §3607(b)(1), when neutral on its face and applied without any evidence of an intent to discriminate against persons protected by the Fair Housing Act and Fair Housing Act Amendments, 42 U.S.C §§3601 - 3631?

II. PARTIES TO THE PROCEEDING

City of Edmonds, Washington

United States of America

Oxford House-Edmonds

Oxford House, Inc.

Herb Hamilton

Parties Dismissed[1]

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[1]The following original parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

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IV. OPINIONS DELIVERED IN THIS CASE

1. Judge William L. Dwyer of the United States District Court, the Western District of Washington, entered an Order on Cross Motions for Summary Judgment in favor of the City of Edmonds and against the named defendants in the original action and the United States of America as plaintiff in the consolidated action on July 15, 1992. (See Order on Cross Motions for Summary Judgment dated July 14, 1992 and Judgment dated July 15, 1992, attached as Appendix A.)

2. The decision of the district court was reversed by Circuit Court Judges Eugene A. Wright, William C. Canby, Jr. and Thomas G. Nelson of the United States Court of Appeals for the Ninth Circuit on March 14, 1994. City of Edmonds v. Washington State Building Code Council, et

al., 18 F.3d 802 (9th Cir. 1994). (See opinion filed March 14, 1994, attached as Appendix B.)

V. GROUNDS FOR JURISDICTION

1. Judgment was entered by the Ninth Circuit on March 14, 1994.

2. No request for rehearing, reconsideration or review en banc was submitted in this matter.

3. Review is sought pursuant to Supreme Court Rule 10.1(a) and 28 U.S.C. 1254.

VI. STATUTE AND ORDINANCE SECTIONS RELIED ON

42 U.S.C. §3607(b)(1) creates an exemption from the Fair Housing Act and Fair Housing Act Amendments:

Section 3607. **Exemption.**

. . .

(b) Numbers of occupants . . .

> (1) [n]othing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

At issue is whether the following provisions of the City of Edmonds, Washington Community Development Code (hereinafter "ECDC") constitute such a reasonable occupancy limitation. ECDC Section 16.20.010 USES defines those uses permitted in a single family residential zone:

> 16.20.010 USES
>
> A. Permitted Primary Uses.
>
> 1. Single-family dwelling units.
>
> B. Permitted Secondary Uses.
>
> 1. Foster homes.

2. Home occupation, subject to the requirements of Chapter 20.20.

3. The renting of rooms without separate kitchens to one or more persons.

4. The keeping of three or fewer domestic animals.

5. The keeping of horses, subject to the requirements of Chapter 5.05.

6. The following accessory buildings:

    a. Fallout shelters.

    b. Private greenhouses covering no more than five percent of the site.

    c. Private stables.

    d. Private parking for no more than five cars.

ECDC Section 16.30.010 USES describes those uses permitted in multifamily residential zones. Because the Zoning Code of the City of Edmonds is cumulative in format, these uses are permitted in all

other (that is more intense) zones of the City. The section provides:

16.30.010 USES

A. Permitted Primary Uses.

1. Multiple dwellings.

2. Single-family dwellings.

3. Retirement homes.

4. Group homes for the disabled.

5. Boarding houses and rooming houses.

6. Housing for low income elderly in accordance with the requirements of Chapter 20.25.

7. Bus stop shelters.

B. Permitted Secondary Uses.

1. All permitted secondary uses in the RS zone, if in conjunction with a single-family dwelling.

2. Home occupations, subject to the requirements of Chapter 20.20.

3. The keeping of one domestic animal.

4. The following accessory uses:

a. Private parking.

b. Private swimming pools and other private recreational facilities.

c. Private greenhouses covering no more than five percent of the site in total.

C. Primary Uses Requiring a Conditional Use Permit.

1. Offices.

2. Community facilities, including buildings used for community activities and services, such as:

a. Schools, colleges, universities.

b. Preschools, day care centers.

c. Hospitals, convalescent homes, rest homes, sanitariums.

d. Churches, temples, synagogues.

e. Fire houses, police stations.

f. Electric substations, pumping stations, water storage, drainage facilities, transmitting and receiving antennas.

g. Parks, playgrounds, pools, golf courses, tennis clubs, lodges.

h. Museums, libraries, art galleries, zoos, aquariums, planetariums.

i. Counseling centers and residential treatment facilities for current alcoholics and drug abusers.

D. <u>Secondary Uses Requiring a Conditional Use Permit</u>.

1. Family day care homes.

2. Mini-day care facilities, provided that:

   a. Mini day care facilities shall not be operated from or within a multiple family dwelling unit or combination of units, but

b. A permit may be issued for a mini day care facility to be operated in a separate, non-residential portion of a multi-family residential dwelling structure operated primarily for the benefit of the residents thereof.

ECDC Section 21.30.010 FAMILY defines "family" for the purposes of the "use" provisions of the code:

21.30.010 FAMILY

Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all other members of such group living together in a dwelling unit.

VII. STATEMENT OF THE CASE

The City of Edmonds, Washington (hereinafter "City") has enacted a

comprehensive plan and zoning code (hereinafter "Community Development Code") pursuant to the authority granted it under the laws of the State of Washington. Washington Revised Code Chapter 35A.63 RCW. The Community Development Code sets aside a portion of the City exclusively for single family residential use. The structure of the City's code is common to the vast majority of cities in the State of Washington and many communities throughout the country. City of Edmonds v. Washington State Building Code Council, et al., 18 F.3d 802 (9th Cir. 1994).

The City's code provisions are consistent with the guidelines the Supreme Court has established. The United States Supreme Court first approved zoning codes setting aside reserves for single family use in Village of Euclid, Ohio v. Amber

Realty Co., 272 U.S. 365, 71 L.Ed. 303, 475 S.Ct. 114 (1926). The City's definition of a family, in a more expansive form, is based on the structure approved by the Court in Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974). Following the direction of the Court, the Community Development Code does not attempt to regulate either the numbers or degree of consanguinity of an extended "family." Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977). Finally, the Community Development Code does not apply one set of use and occupancy limitations to groups of handicapped individuals and another to families and other groups of unrelated persons in violation of the precepts set forth in City of Cleburne, Texas v.

Cleburne Living Center Inc., 473 U.S. 432, 87 L.Ed.2d 313, 105 S.Ct. 3249 (1985).

The present dispute began during the summer of 1990. Mark Spence, a representative of Oxford House, Inc., the national parent organization of Oxford House-Edmonds, came to the Puget Sound area on behalf of his organization to establish a self-governing group residence for recovering alcoholics and drug addicts. (The factual statements in this petition are from the Clerk's papers filed with the Ninth Circuit which include a factual stipulation between the parties). Mr. Spence reviewed the houses available for rent in the July 6, 1990 edition of the Seattle Times classified advertisements. He selected a rental in Edmonds, Washington and leased the residence at 8704 - 216th Street S.W.,

Edmonds, Washington from defendant Herb Hamilton. Mr. Spence did not review the zoning classification of the residence prior to leasing it. It was the only residence about which he inquired.

Prior to occupation of the recovery house, Mr. Spence distributed literature describing Oxford House's operation to its neighbors. The literature described Oxford House's program including the need (in Oxford House's experience) for approximately 10 to 12 residents in order to provide an adequate economic base to enable the recovery house to be self-sufficient. After receiving the Oxford House literature, neighbors filed complaints with the City's zoning officials.

The City's code enforcement officer investigated the complaints by inspecting

the house with the permission and in the presence of an Oxford House representative. Based upon his inspection, the code enforcement officer found that more than five unrelated adult individuals were living in the house. The enforcement officer referred the matter to the city attorney's office for prosecution as a code violation. The City filed misdemeanor charges in municipal court against Mr. Spence, the Oxford House representative and Herb Hamilton, the owner of the house. These individuals in turn filed complaints with the U.S. Department of Housing and Urban Development (hereinafter "HUD") alleging violation of the Fair Housing Act Amendments.

Following contact by Tim Robison, a HUD investigator, City officials

voluntarily withdrew the pending charges and have taken no further enforcement action until this issue is resolved by the federal courts.

The City then initiated a declaratory judgment action against the Oxford House defendants, HUD and the State Building Code Council. The City also initiated review of its Community Development Code in order to assess its accommodation of the local Oxford House facility (hereinafter "Oxford House-Edmonds") and other congregate living arrangements of disabled persons. The City repealed sections which required a conditional use permit for group homes for the disabled in multi-family zones because of its concern that a conditional use permit requirement conflicted with the principles established in the City of Cleburne, Texas v. Cleburne

Living Center, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). The City's amendments opened one-quarter of the City's rental housing stock or 186 single family residences for group home use as a matter of right.

At the district court the United States government requested dismissal of the United States governmental defendants. The district court granted the motion. Six months later, the Department of Justice initiated a separate civil action against the City alleging violations of the Fair Housing Act and Fair Housing Act Amendments. The two actions have been consolidated. In order to present a more straightforward issue to the district court, the parties entered into voluntary dismissals of the City of Everett, Washington, the Washington State Building

Code Council and Oxford House-Hoyt (an Oxford House facility in the City of Everett, Washington).

Cross summary judgment motions were presented to the Honorable William L. Dwyer, Judge of the U. S. District Court, Western District of Washington. Judge Dwyer entered a decision in favor of the City of Edmonds finding the City's definition of single family zoning to be within the exemption set forth at 42 U.S.C. §3607(b)(1) for the reasonable occupancy limitations of local governmental entities. His decision was based upon the plain meaning of the exemption and the Eleventh Circuit Court of Appeals decision in Elliott v. City of Athens, Ga., 960 F.2d 975 (11th Cir. 1992), cert. denied, 113 S.Ct. 376, 121 L.Ed.2d 287, 61 U.S.L.W. 3155 (U.S., Oct.

19, 1992). City of Edmonds v. Washington State Building Code Council, et al., Western District Court of Washington Case Nos.: C91-WD, C91-1273WD, (July 15, 1992).

The Ninth Circuit Court of Appeals reversed this decision explicitly rejecting the Eleventh Circuit's findings in Elliott. The Court of Appeals found the exemption to be ambiguous as applied to the Edmonds ordinances and based its decision in large part upon the legislative record before Congress.

VIII. GROUNDS FOR ORIGINAL JURISDICTION

Original jurisdiction in this matter was based upon federal question jurisdiction: the jurisdiction of the Court of Appeals was based on an appeal from the final judgment of a United States District Court. 28 U.S.C. 1331 and 28 U.S.C. 1294(1).

IX. ARGUMENT - REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The United States Supreme Court has recognized the fundamental purposes of zoning codes and established guidelines for the exercise of zoning authority by local entities.

The basic building block for the exercise of zoning powers by a local jurisdictions is the creation of a zone in each community set aside for the residential use of single families. Village of Euclid, Ohio v. Amber Realty Co., 272 U.S. 365, 71 L.Ed. 303, 475 S.Ct. 114 (1926). Over the years the Supreme Court has affirmed a community's ability to limit the number of unrelated adults who may occupy a residence in the single family zone and struck down attempts to regulate by similar definitions extended familial relationships. Village of Belle

Terre v. Boraas, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977). Over the past 68 years the United States Supreme Court defined by a series of "bright line" decisions the area in which communities may exercise their zoning powers.

At issue in this case is the impact, if any, of the Fair Housing Act Amendments upon traditional Euclidian zoning schemes. Respondents assert that Congress intended, by its passage of the Fair Housing Act Amendments, to prohibit cities from regulating the number of unrelated disabled persons who may occupy a residence in a single family zone. They reason that because traditional single family zoning does not (and indeed cannot)

regulate the number of "family members" who can occupy a residence, but limits the number of unrelated disabled persons who may do so, traditional single family zoning allegedly discriminates against the disabled in violation of the Fair Housing Act.

Local governments utilize single family zoning as the basic building block for their zoning schemes. Except in a limited number of states whose constitutions limit or prohibit regulation of unrelated adults, most communities differentiate families and groups of unrelated adults as they define single family zoning. Rohan, Patrick J., Zoning and Land Use Controls, (1968), pp. 3-162 fn8; Anderson, Robert M., American Law of Zoning, (1986), p. 198. City of Edmonds v. Washington State Building Code Council,

18 F.3d 802 (9th Cir. 1994). In doing so, local jurisdictions have relied upon the direction provided by the United States Supreme Court in Euclid, Belle Terre and Moore. That reliance by many local jurisdictions throughout the country makes the issue presented by this case of national importance.

Furthermore, the Federal Courts of Appeal are in conflict on this issue. The Eleventh Circuit in its decision in Elliott v. City of Athens, Ga., 960 F.2d 975 (11th Cir. 1992), cert. denied, 113 S.Ct. 376, 121 L.Ed.2d 287, 61 U.S.L.W. 3155 (U.S., Oct. 19, 1992) found traditional single family zoning to be a type of occupancy limitation exempt from Fair Housing Act coverage. The Third Circuit applied similar reasoning in a decision upholding a zoning ordinance

limiting the residency of unrelated adults when applied to a shelter for battered women. Doe v. City of Butler, 892 F.2d 315, 320 (3rd Cir. 1989). The Eighth Circuit has affirmed the ability of local communities to apply zoning controls in the form of distancing requirements for group homes despite a restriction of the housing choices of the disabled. Familystyle of St. Paul, Inc. v. City of St. Paul, Minn., 728 F. Supp. 1396 (D. Minn. 1990) aff'd 923 F.2d 91 (8th Cir. 1991). The Ninth Circuit's decision in this case expressly rejects the reasoning of the Eleventh Circuit and conflicts with the position of the Eleventh, Third and Eighth federal circuits.

Over the years, the federal courts have studiously avoided becoming zoning bodies of first resort. The Ninth Circuit

decision in this case would remove the basic zoning block of single family residential zoning and place the federal courts in the position of reviewing the choices of groups of unrelated disabled persons without regard to the carefully developed, neutral zoning schemes of local jurisdictions. Nothing in the legislative history indicates Congress' intent to overturn single family zoning. Rather it indicates an intent only to codify the holding in City of Cleburne, Texas v. Cleburne Living Center Inc., 473 U.S. 432, 87 L.Ed.2d 313, 105 S.Ct. 3249 (1985). The Cleburne decision prohibited disparate treatment of groups of disabled persons from other groups of unrelated persons. The Ninth Circuit's decision would prohibit disparate treatment groups of unrelated disabled persons from related

groups, families, and is an unwarranted expansion of the Fair Housing Act Amendments which attacks the basic building block of zoning.

In this case a facially neutral ordinance with no evidence of discriminatory application or intent is alleged to be discriminatory based solely upon its distinction between families and unrelated adults, a distinction based on the line of Supreme Court decisions regarding single family zoning. The split in the Circuits creates an atmosphere of uncertainty that necessitates resolution. Until this issue is resolved profit and nonprofit investors in residential treatment facilities and local governments are without clear direction.

The City of Edmonds therefore respectfully requests that the Court

accept review of this matter and address the split between the federal circuits and the uncertainty created for local jurisdictions and the disabled community, particularly nonprofit organizations sponsoring recovery homes. The City of Edmonds initiated a declaratory judgment in order to obtain the direction of the federal courts on the application of the Fair Housing Act and Fair Housing Act Amendments, 42 U.S.C. §§3601 - 3631, to its Community Development Code. The City has made no attempt to oppose the establishment of recovery houses and throughout this litigation has expressly recognized the need throughout our country for residential treatment alternatives for recovering drug addicts and alcoholics. The city has taken reasonable steps to ensure that such facilities may be

operated within its borders. From the City's perspective the issue is not <u>whether</u> such organizations are to be allowed within a community but <u>where</u> and at whose direction. Accordingly the City urges the Court to accept review of this issue.

Respectfully submitted this 9 day of June, 1994.

OGDEN MURPHY WALLACE

By: 
W. Scott Snyder

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF EDMONDS, a municipal corporation, v. *Plaintiff-Appellee,* WASHINGTON STATE BUILDING CODE COUNCIL, *Defendant,* and OXFORD HOUSE, INC., a Delaware corporation; OXFORD HOUSE-EDMONDS, an unincorporated association and HERB HAMILTON, *Defendants-Appellants.*	No. 92-36640 D.C. No. CV-91-215-WLD
UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. CITY OF EDMONDS, a municipal corporation, *Defendant-Appellee.*	No. 92-36735 D.C. No. CV-91-1273-WLD OPINION

Appeal from the United States District
Court for the Western District
of Washington
William L. Dwyer, District Judge,
Presiding
Argued and Submitted
January 5, 1994—Seattle, Washington

Filed March 14, 1994

Before: Eugene A. Wright, William C. Canby, Jr., and Thomas G. Nelson, Circuit Judges.

Opinion of Judge Wright

SUMMARY

Individual Rights/Housing Discrimination/Real Estate

The court of appeals reversed a district court judgment and remanded. The court held that a city's zoning provision limiting certain neighborhoods to detached buildings used by two or more related persons or a group of five or fewer unrelated persons was not exempt from housing discrimination requirements under the Fair Housing Amendments Act of 1988 (FHAA).

Under appellee City of Edmonds' Community Development Code, single-family dwelling units are the only permitted

primary uses in neighborhoods zoned single-family residential. Single-family dwelling unit is defined to mean a detached building used by an individual, two or more related persons, or a group of five or fewer unrelated persons.

Appellant Oxford House-Edmonds, a leased residence for 10 to 12 recovering adult alcoholics and drug addicts, stands in a neighborhood zoned single-family residential. Oxford House violated the City's zoning provision because it housed more than five unrelated persons. The City issued criminal citations and declined to permit continued operation of Oxford House in the residential zone.

The FHAA prohibits discrimination against the handicapped in the sale or rental of a dwelling. Reasonable local restrictions "regarding the maximum number

of occupants permitted to occupy a dwelling," however, are exempt from the FHAA.

The City filed a declaratory judgment action, seeking a ruling that the single-family residential zoning provision did not violate the FHAA. The government filed an action alleging that the City's failure to make a reasonable accommodation violated the FHAA. The actions were consolidated, and the district court granted summary judgment to the City. The court ruled that the challenged zoning provision was exempted from the FHAA's requirements because it was a restriction "regarding the maximum number of occupants permitted to occupy a dwelling."

Oxford House and the government appealed, contending that the FHAA exempts only those restrictions that limit the

number of all occupants, whether related or not.

[1] The FHAA's plain language did not reveal whether Congress intended to exempt the City's zoning ordinance. The zoning provision did not regulate the maximum number of related occupants.

[2] Exempting the City's zoning provision, however, would contravene a House Report's directive that exempted restrictions apply to all occupants. [3] Moreover, exempting the City's ordinance as an occupancy restriction would undermine the purposes of the FHAA. [4] The legislative history and purposes of the FHAA demonstrated that Congress intended city zoning policies to reasonably accommodate handicapped persons.

COUNSEL

Irving Gornstein, United States Department of Justice, Washington, D.C., for the plaintiff-appellant.

Robert L. Heller, Douglas H. Fleming, Riddell, Williams, Bullitt & Walkinshaw, Seattle, Washington, for the defendants-appellants.

W. Scott Snyder, Ogden, Murphy & Wallace, Seattle, Washington, for the plaintiff-appellee-defendant-appellee.

OPINION

WRIGHT, Circuit Judge:

Group homes of more than five unrelated recovering alcoholics and drug addicts are effectively excluded from single-family residential zones in

Edmonds, Washington. We ask whether the Fair Housing Amendments Act of 1988 (FHAA) exempts Edmonds' zoning ordinance from the statute's prohibition against discrimination based on handicap. The district court held that an exemption in the FHAA for occupancy restrictions applied. It relied on a similar holding in *Elliott v. Athens*, 960 F.2d 975, 979-81 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992). We disagree with *Elliott*, and so must reverse and remand.

BACKGROUND

Oxford House-Edmonds (Oxford House) is a leased residence for 10 - 12 recovering adult alcoholics and drug addicts.[1] The residents are handicapped

[1]Much of the background is drawn from a joint stipulation submitted by the parties with their cross-motions for summary judgment.

persons under the FHAA, 42 U.S.C. § 3602(h). The home stands in a residential neighborhood away from commercial zones, liquor stores, and illicit drug activity to minimize the likelihood of a relapse by a resident.

It is an unincorporated association that operates under a charter issued by Oxford House, Inc., which sponsors houses around the country, incl"ding 17 in Washington State. It is self-supporting, democratically governed, and required to expel any resident who uses alcohol or drugs. The house must have 6 or more residents to ensure financial self-sufficiency, to provide a supportive atmosphere for successful recovery, and to comply with federal requirements for the receipt of state start-up loans. 42 U.S.C. § 300x-25.

Oxford House is in a neighborhood zoned single-family residential. Edmonds Community Development Code (ECDC) § 16.20.000 *et seq*. The only permitted primary uses are single-family dwelling units. ECDC § 16.20.010(A)(1). "[A] single family dwelling [unit] means a detached building used by one family, limited to one per lot." ECDC § 21.90.080. "Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage. . . ." ECDC § 21.30.010.

Edmonds issued criminal citations to the owner of the Oxford House and one resident. Oxford House violated the zoning provision because it housed more than five unrelated persons. Edmonds

agreed "to refrain from any enforcement action until the resolution of this litigation." Oxford House requested that Edmonds make a reasonable accommodation as required under the FHAA, 42 U.S.C. § 3604(f)(3)(B), by permitting it to continue operation in the single-family residential zone. The city declined to permit continued operation in the residential zone, but did pass an ordinance listing group homes as permitted uses in multi-family and general commercial zones. There are no allegations that Edmonds acted out of any animus against the occupants of Oxford House because of their handicap.

Edmonds filed a declaratory judgment action. It sought a ruling that the single-family residential zoning provision did not violate the FHAA. The United

States filed an action alleging that Edmonds' failure to make a reasonable accommodation violated the FHAA. The two were consolidated. The district court granted summary judgment to Edmonds. It ruled that the challenged zoning provision was exempted from the requirements of the FHAA because it was a "restriction[] regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). Oxford House and the United States appeal.[2]

ANALYSIS

We examine whether 42 U.S.C. § 3607(b)(1) exempts Edmonds' single-family zoning ordinance. Whether Edmonds complied with the substantive requirements of the FHAA is not at issue because the

[2]These parties are referred to as Oxford House.

district court did not reach that question. The district court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. We review de novo the grant of summary judgment. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992).

Courts generously construe the Fair Housing Act (FHA), 42 U.S.C. § 3601, *et seq. Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972). As a broad remedial statute, its exemptions must be read narrowly. *Elliott*, 960 F.2d at 978-79 (construing FHAA); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (construing Fair Labor Standards Act).

We look to the text of the statute to evince Congressional intent. The plain language will control, "unless (1) the statutory language is unclear, (2) the

plain meaning of the words is at variance with the policy of the statute as a whole, or (3) a clearly expressed legislative intent exists contrary to the language of the statute." *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 280 n.4 (9th Cir. 1989).

A. Plain Language of FHAA

Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81. It initially prohibited discrimination on the basis of race, color religion, or national origin. Congress extended protection to handicapped persons in the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619.

The FHAA makes it unlawful

> [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap.

42 U.S.C. § 3604(f)(2). It defines discrimination to include

> a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

42 U.S.C. § 3604(f)(3)(B). Participation in a supervised drug rehabilitation

program, coupled with non-use, meets the definition of handicapped. 42 U.S.C. § 3602(h); *United States v. Southern Management Corp.*, 955 F.2d 914, 922 (4th Cir. 1992).

The FHAA exempts certain regulations:

> Nothing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

42 U.S.C. § 3607(b)(1). Edmonds' use restriction permits "two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related" to live in a single-family dwelling. ECDC § 21.30.010. The question is whether section 3607(b)(1)

exempts Edmonds' single-family residential zoning ordinance from the FHAA.

[1] We cannot discern from the plain language of the statute whether Congress intended to exempt Edmonds' zoning ordinance. Edmonds argues that its single-family use restriction is a "restriction regarding the maximum number of occupants." 42 U.S.C. § 3607(b)(1). Yet the zoning provision does not regulate the maximum number of related occupants. Oxford House argues that the statute exempts only those restrictions that limit the number of all occupants, whether related or not. Although both interpretations could be inferred, neither follows directly from the plain language.[3]

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[3]Put differently, Edmonds reads the exemption broadly to include use restrictions, and Oxford House reads the exemption narrowly to cover only occupancy

B. Legislative History of Exemption

When a statute is ambiguous, legislative history may provide guidance. *Toibb v. Radloff*, 111 S. Ct. 2197, 2200

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restrictions. The two differ. Occupancy restrictions are typically found in housing codes.

> Housing codes . . . set minimum standards for the occupancy of residential units. Items covered in such codes may include minimum space per occupant . . . . The major purpose of housing codes is to prevent overcrowding and the blighting of residential dwellings.

1 P. Rohan, *Zoning and Land Use Controls* § 1.02[6][c] (1993). Use restrictions, however, are associated with zoning provisions.

> Zoning is the process by which a municipality legally controls the use which may be made of property . . . . Zoning ordinances are adopted to divide the land into different districts, and to permit only certain uses within each zoning district.

Id. at § 1.02[1].

(1991); *Columbia Pictures*, 866 F.2d at 280 n.4. "[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Garcia v. United States*, 469 U.S. 70, 76 (1984). Congress issued one report on the FHAA. It says:

> These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by

> governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

H.R. Rep. No. 711, 100th Cong. 2d Sess. *reprinted in* 1988 U.S.C.C.A.N. 2173, 2192.

[2] Exempting Edmonds' zoning provision would contravene the Report's directive that exempted restrictions apply to all occupants. The House Report does, however, anticipate exempting Edmonds' occupancy restriction, which requires sleeping rooms to have a floor area of "not less than 70 square feet. . . ."

Uniform Housing Code (UHC) § 503(b), 1988 Edition.[4]

C. FHAA Policy

Courts should avoid an "unreasonable [result] 'plainly at variance with the policy of the legislation as a whole.'" *United States v. American Trucking*

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[4]Edmonds employs both occupancy restrictions and use restrictions. ECDC § 19.10.000 incorporates the UHC, 1988 Edition.

> **Floor Area.** Every dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two.

UHC § 503(b). The zone classifications in the ECDC, however, impose control through use restrictions. *See* ECDC § 16.20.010 (permitted primary and secondary uses in single-family residential zone).

Ass'ns., 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)). "'We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act.'" *Columbia Pictures*, 866 F.2d at 280 n.4 (quoting *Richards v. United States*, 369 U.S. 1, 11 (1962).

The House Report indicates that Congress intended the FHAA to apply to "local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps." 1988 U.S.C.C.A.N. at 2185. Congress intended to prohibit "terms or conditions . . . which have the effect of excluding, for example, congregate living arrangements for persons with handicaps." *Id.* at 2184. These include the "enforcement of otherwise

neutral rules an regulations on health, safety and land-use in a manner which discriminates against people with disabilities." *Id.* at 2185.[5]

To effectuate this intent courts have applied the FHAA "where the application of a neutral [zoning] rule barred group homes of handicapped people from operating in certain areas." *Smith & Lee Assocs., Inc. v. Taylor*, No. 92-1903, slip op. at 19, 1993 U.S. App. LEXIS 33971, *30 (6th Cir. Dec. 30, 1993) (applied to single-family zone permitting nonprofit housekeeping units) (citing *Oxford House, Inc. v. Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992) (applied to single-family zone burdening unrelated persons)).

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[5]Edmonds' ordinance is facially neutral because it treats handicapped and non-handicapped persons similarly.

The FHAA imposes an affirmative duty to reasonably accommodate handicapped persons. 42 U.S.C. § 3604(f)(3)(B). Reasonable accommodation is borrowed from case law interpreting the Rehabilitation Act of 1973, 1988 U.S.C.C.A.N. at 2186 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)). "[W]hile a [city] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

Congress intended the FHAA to protect the right of handicapped persons to live in the residence of their choice in the community. 1988 U.S.C.C.A.N. at 2185. The FHAA was to "end the unnecessary exclusion of persons with handicaps from

the American mainstream." *Id.* at 2179. *See United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992) (question not whether any housing made available, but whether housing individual desired was denied on impermissible grounds); *Familystyle of St. Paul, Inc. v. St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991) (Congress did not intend the FHAA to segregate mentally ill from social mainstream).

[3] Exempting Edmonds' ordinance as an occupancy restriction would undermine the purposes of the FHAA. Many cities in this country have adopted similar use restrictions. *See Elliott*, 960 F.2d at 980; *Moore v. East Cleveland*, 431 U.S. 494, 495-96 (1977). Applying the exemption would insulate these single-family residential zones from the sweep of FHAA requirements. Courts must ask

whether a city's zoning satisfies FHAA standards, or whether a city has to alter neutral zoning policies to reasonably accommodate and integrate handicapped persons. The answers will vary depending on the facts of a given case. But these questions must be posed, or the policies the FHAA seeks to enforce will be frustrated.

D. *Elliott v. Athens*

We disagree with the Eleventh Circuit's opinion in *Elliott*. That court held that section 3607(b)(1) exempted a zoning ordinance that permitted no more than four unrelated persons to reside in a single-family dwelling. *Elliott*, 960 F.2d at 980-81. A group home for recovering alcoholics and drug addicts had challenged the ordinance. *Id.* at 976.

The *Elliott* court recognized the constitutionality of use restrictions that limited occupancy in single-family residences to two unrelated persons, but any number of related persons. *Id.* at 980; *see Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). The court reasoned that Congress could not have intended to apply the FHAA to *Belle Terre* use restrictions, which are constitutional and widely prevalent in the United States. *Elliott*, 960 F.2d at 980.[6]

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[6]Conversely, it noted that a use restriction that limited occupancy to members of a single family, but excluded a grandmother living with a grandson, impermissibly intruded into family decisions and ran afoul of the Due Process Clause of the Fourteenth Amendment. *Moore*, 431 U.S. at 499. The Court has not, however, held an occupancy restriction that applies to all residents to be unconstitutional. In *Moore* the plurality opinion positively referenced such limits. It pointed out

[4] But the question is not whether Edmonds' ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre*. It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance. The legislative history and purposes of the FHAA demonstrate that Congress intended city zoning policies to reasonably accommodate handicapped

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> that East Cleveland has another ordinance specifically addressed to the problem of overcrowding. Section 1351.03 limits population density directly, tying the maximum permissible occupancy of a dwelling to the habitable floor area.

Moore, 431 U.S. at 500 n.7 (citation omitted). Emphasizing the apparent approval of such a regulation, Justice Stevens said, "[t]o prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space." *Id*. at 520 n.16 (Stevens, J., concurring).

persons. This can require something more than the enactment of minimally constitutional and facially neutral zoning ordinances. Edmonds must satisfy the FHAA standards. Accordingly, we conclude that Edmonds' single-family use restriction is not exempted. Section 3607(b)(1) only exempts occupancy restrictions that apply to all occupants, whether related or not.

E. Conclusion

We voice no opinion as to whether Edmonds complied with the substantive standards of the FHAA. Because it exempted the zoning ordinance, the district court did not review the merits. Many factors must be weighed to determine whether reasonable accommodation under 42 U.S.C. § 3604(f)(3)(B) was achieved. We

reverse and remand to the district court for the necessary findings.[7]

REVERSED AND REMANDED.

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[7]Attorneys' fees may not be awarded to Oxford House under 42 U.S.C. § 3613(c)(2). It must await the outcome of further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS, Plaintiff, v. WASHINGTON STATE BUILDING CODE COUNCIL, et al., Defendants.	NO. C91-215WD JUDGMENT
UNITED STATES OF AMERICA, Plaintiff, v. CITY OF EDMONDS, Defendant.	NO. C91-1273WD

In accordance with the Order on Cross-Motions for Summary Judgment entered herein, judgment is entered declaring that the five-person limit of the Edmonds Community Development Code, as applied to Oxford-House Edmonds, does not violate the

Fair Housing Act, 42 U.S.C. § 3601, et seq.

Filed and entered this 15th day of July, 1992.

BRUCE RIFKIN, Clerk

By
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS, Plaintiff, v. WASHINGTON STATE BUILDING CODE COUNCIL, et al., Defendants.	NO. C91-215WD ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
UNITED STATES OF AMERICA, Plaintiff, v. CITY OF EDMONDS, Defendant.	NO. C91-1273WD

I. PROCEDURAL BACKGROUND

On February 13, 1991, the cities of Edmonds, Washington, and Everett, Washington, filed suit seeking a declaratory judgment that their zoning ordinances which restrict the number of

unrelated adults who may live in a single family residence do not impermissibly discriminate against disabled persons in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq. The controversy centered on Oxford House, Inc., an organization that had established in Edmonds, and sought to establish in Everett, a group residence for recovering drug addicts and alcoholics. Everett's claims were dismissed by stipulation on April 30, 1992. The remaining defendants in the Edmonds action are Herb Hamilton, Oxford House, Inc., and Oxford House-Edmonds (collectively the "Oxford House defendants"), and the Washington State Building Code Council.

On September 12, 1991, the United States filed a complaint alleging that the City of Edmonds had violated the FHA. On

September 26 the court consolidated the two actions.

Edmonds, the Oxford House defendants and the United States have moved for summary judgment. Oral argument was held on June 25, 1992. All materials filed in regard to the motions, and the arguments of counsel, have been fully considered.

II. UNDISPUTED FACTS

The "Joint Stipulations for Purposes of Dispositive Motions" include the following facts:

Oxford House-Edmonds is an unincorporated association operating under a charter issued by Oxford House, Inc., and is composed of the residents of a house at 8704 216th Street, S.W., in Edmonds, Washington. The residents are approximately ten to twelve recovering adult alcoholics and drug addicts. The

house is located within the area zoned "RS" (single-family residential) under the Edmonds Community Development Code ("ECDC"), which limits the number of unrelated persons living together in a dwelling in such an area to five.

The experience of Oxford House, Inc., has shown that eight to twelve residents are needed to achieve financial self-sufficiency and a supportive environment for recovery; Oxford House-Edmonds could not function with five or fewer residents.

III. ANALYSIS

A. SUMMARY JUDGMENT STANDARDS

Summary judgment under Fed. R. Civ. P. 56 may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is one that affects the outcome of the

case and requires a trial to resolve differing versions of the truth. Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 (9th Cir. 1982). In deciding the motion the court views the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). However, the non-moving party must respond to an adequately supported motion by showing that a genuine issue of material fact exists; if the response falls short of that, summary judgment should be granted. Fed. R. Civ. P. 56(e); T.W. Elec. Serv., Inc., 809 F.2d at 630-31.

Here, there is no genuine issue of material fact for trial, and the case may be decided on the cross-motions for summary judgment.

B. "REASONABLE ACCOMMODATIONS"

The FHA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). As the parties agree, recovering alcoholics and drug addicts are handicapped within the meaning of the statute. Under 42 U.S.C. § 3604(f)(3)(B), discrimination against a handicapped person includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."

A "reasonable accommodation" could be made here, for example, by the City of Edmonds agreeing to waive the five-person limit as to Oxford House-Edmonds. The question, however, is whether the requirements of §§ 3604(f)(1) and 3604 (f)(3)(B) apply in the first place, in view of the exemption discussed below.

C. EXEMPTION FOR MAXIMUM OCCUPANCY RESTRICTIONS

The FHA provides that "[n]othing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). Under the plain language of this exemption, the ECDC's limit of five unrelated persons to a dwelling is a "restriction regarding the maximum number of occupants." Nothing in

the legislative history of the FHA requires a different interpretation. See Elliott v. City of Athens, Georgia, 960 F.2d 975, 979-81 (11th Cir. 1992).

The United States contends that the exemption is nevertheless inapplicable because the five-person limit is not "reasonable" within the meaning of § 3607(b)(1), in that Edmonds has failed to make "reasonable accommodations" under § 3604(f)(3)(B). Such an interpretation of "reasonable" must be rejected because it would render § 3607(b)(1) superfluous. See Central Mont. Elect. Power Co-op., Inc. v. Administrator, Bonneville Power Admin., 840 F.2d 1472, 1478 (9th Cir. 1988).

No other ground has been suggested, and none appears in the record, for a finding that the five-unrelated-person

limit is not "reasonable." Among the stated purposes of the ECDC's residential zoning rules are "to preserve . . . [f]reedom from air, water, noise and visual pollution[,] . . . [t]o minimize traffic congestion and avoid the overloading of utilities[,] . . . [and] [t]o protect residential uses from hazards and nuisances." ECDC 16.10.000. The Supreme Court has upheld occupancy restrictions for such purposes, even when the number of unrelated persons in a dwelling is limited to two. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Edmonds cannot be faulted for exempting related persons from the five-person limit; such a restriction on traditional families would probably violate the Due Process Clause of the Fourteenth Amendment. See Moore v. City of East

Cleveland, Ohio, 431 U.S. 494 (1977). The Eleventh Circuit has upheld, against the claims of a proposed group home for recovering alcoholics, the reasonableness of an ordinance limiting to four the number of unrelated persons who could occupy a single residence. See Elliott, supra, 960 F.2d at 981-84.

On the record here, Edmonds' five-unrelated-person limit is reasonable as a matter of law under § 3607(b)(1), and is therefore exempt from the "reasonable accommodations" requirement of § 3604(f)(3)(B).

D. CONCLUSION

For the reasons stated, the summary judgment motion of the City of Edmonds is granted and the motions of the Oxford House defendants and of the United States

are denied. The clerk is directed to enter judgment accordingly.

The clerk will send copies of this order to all counsel of record.

Dated: July 14, 1992.

William L. Dwyer
United States District Judge